Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UEON C. BAK,

Petitioner,

vs.

MARVIN T. RUNYON,
Postmaster General,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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QUESTIONS PRESENTED

Bak contends that a material point of fact was overlooked in the decision. The Court of Appeal's decision does not address the following argument which casts doubt on Respondent's testimony. Note the following (contained in the appeals brief):

Of much greater significance is that Oliver testified at the same administrative hearing that during this meeting on the 10th, Bak said he wanted to "do something about the removal" notice so that the Post Office would "just let him alone until May" when he would leave for another job. Oliver told him she could not help him in contesting the removal order because she was not "in that chain of command." (ER 19, p. 34:11-16) Why would Bak make this remark to Oliver if he had not already withdrawn his resignation? Moreover, why would Oliver tell him that she could not help him with the removal order because she was not "in that chain of command" rather than simply remind him that he had already resigned and it was his resignation not the removal order that was the reason he could not keep working? (ER 19, p. 34:11-16) The only reasonable inference is that she was aware he wanted to withdraw his resignation. In fact, in that same testimony, Oliver did go as far as to concede that during her conversation with Bak, she

understood that he was "contemplating" withdrawing his resignation. (ER 19, p. 43:21-44:3) Thus, the trial court's finding that Oliver left that meeting with Petitioner with the idea that he was "intent on resigning" (ER 28, p. 5) was plainly mistaken.

Bak presents sufficient evidence for a rehearing on the material point of fact overlooked in the decision of the Ninth Circuit Court of Appeals.

1. Bak had been in a meeting with Peggy Oliver (personnel manager) for four hours.
2. Bak rescinded his resignation before effective date.
3. Bak went back to work.
4. Postal Service doesn't accept rescission or follow rules.

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SUPREME COURT OF THE UNITED STATES

October Term, 1996

UEON C. BAK,

Petitioner,

vs.

MARVIN T. RUNYON, Postmaster General,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner, UEON C. BAK, hereby respectfully prays that a Writ of Certiorari issue to review the order of the Ninth Circuit Court of Appeals, docket No. 96-55658 entered on April 28, 1997. (Appendix A)

STATEMENT OF ISSUES PRESENTED

WHETHER THE DISTRICT COURT'S FACTUAL FINDING THAT RESPONDENT'S FAILURE TO PERMIT APPELLANT TO WITHDRAW HIS RESIGNATION WAS

NOT DUE TO AGE DISCRIMINATION WAS CLEARLY ERRONEOUS.

STATEMENT OF JURISDICTION

The District Court had jurisdiction over the original action pursuant to 28 U.S.C. Sections 1331 and 1343(a) because it raised a federal question, to wit, discrimination in violation of the Age Discrimination in Employment Act of 1967 as amended, 29 U.S.C. Sections 621 et. Seq., and 42 U.S.C. Sections 2000(e) et. Seq. This court has jurisdiction over the appeal from a final order and judgment after a court trial granting a defense verdict under 28 U.S.C. Section 1291, filed on March 8, 1996. (Excerpt of Record[1] 28) The Notice of Appeal was filed on May 2, 1996. (ER 29)

[1] Hereinafter ER. The numerical references are to the record item number and the specific page number of that item is specified if necessary.

STATEMENT OF CASE[2]

On September 22, 1989, Bak filed an administrative complaint with the EEOC alleging discrimination based on race, color, religion, national origin, sex, age, and reprisal. His apparent contention was that the Postal Service's refusal to accept his withdrawal of resignation was discriminatory. The only evidence offered by Petitioner regarding discrimination was the names of other Postal Service employees who were permitted to withdraw their resignations.

After a hearing, an administrative law judge (ALJ) held that Petitioner failed to establish a prima facie case of discrimination based on his national origin. Bak appealed the ALJ's decision tot he EEOC Office of Review and Appeals which affirmed the decision. Finally, Bak moved to reopen or for reconsideration. In response to the motion, the EEOC noted Bak's complaint alleged discrimination on the basis of race, color, religion, sex, age and national origin. However, it denied the motion because Bak failed to establish a basis for reopening or reconsideration, and it affirmed its previous decision, stating Bak failed to establish a prima facie case of discrimination

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[2] The bulk of this Statement is extracted from this court's previous opinion in *Bak v. Postal Service, No. 93-56249, 52 F.3d 241 (1995).*

based on race or color. This final decision of the EEOC was issued on March 3, 1991.

On February 19, 1993, Bak filed a civil suit in federal district court alleging age discrimination, pursuant to 29 U.S.C. Sections 621, et seq., the Age Discrimination in Employment Act of 1967 (ADEA), as a result of the Postal Service's refusal to accept his withdrawal of resignation. The district court dismissed the complaint for lack of subject matter jurisdiction, holding that Bak had failed to exhaust his administrative remedies. Bak timely appealed the district court's dismissal.

In *Bak v. Postal Services* (9th Cir. 1995) 52 F.3d 241, 244, this court reversed and remanded because exhaustion was not required. The matter was thereafter tried without jury by the district court. (ER 27, 28) The court entered judgment in favor of Postal Service. (ER 27, 28) Bak timely appealed from that judgment. (ER 29)

STATEMENT OF FACTS

Bak commenced employment with respondent, United States Post Office, in 1978, and remained so employed until his termination on September 11, 1989. (Reporter's Transcript 14:8-19 [hereafter RT].) At that time, he was 46 years of age.

(ER 28, p. 2) That termination was based upon a resignation he had submitted on August 10, 1989. (ER 14) On August 10, 1989, at around 3:00 a.m., the end of his shift, Bak received a Notice of Proposed Removal. (ER 14) He rashly told his supervisor, Bob Butts: "You are devil. I don't want to argue with you here wasting time. You want me to be fired from post office. I better resignation [sic]." (RT 21:10-13.) Bak was provided a form which he signed indicating that he was resigning effective September 1, 1989. (RT 21:13-16.)

Once Bak returned home, he slept for three or four hours. (RT 23:12-16.) Refreshed, he decided to reconsider his decision and returned to the Post Office on August 10, 1989 to withdraw the resignation. At the personnel office, he submitted a letter withdrawing his resignation to the secretary, Diana Suttick, and asked to see the personnel director, Peggy Oliver. (RT 23:17 - 25:19.) He met with Peggy Oliver for several hours and discussed why he felt the notice of removal was unjustified. At one point, they went outside so Oliver could smoke a cigarette. Peggy Oliver also suggested that Bak was "too old" to work in the "trouble[d] situation" at the Post Office. Bak also discussed his background and family problems he had experienced. (RT 25:20-29:10.)

Bak returned to work for the 3:00 p.m. shift on August 10, 1989. (RT 29:16-22.) Bak told Butts that he had met with

Oliver and withdrawn his resignation. Bak also told his family and the union officials that he was still going to work at the Post Office. (RT 30:4-10.)

Bak continued to work past September 1, 1989 until September 11, 1989. Prior to the 11th, no one said anything to him about why he was still working. (RT 30:17-25.) On September 11th, at 3:00 a.m., Butts told him that he could not continue working. Butts acknowledged that Bak had cancelled the resignation and expressed confusion over what had happened that caused his resignation to go through. He told Bak he would have to return at 9:00 a.m. to speak to Oliver about this. (RT 31:3-10.)

Bak testified he spoke to Oliver on September 11th. She simply informed him that his resignation had been processed and if he had a problem he would have to go to his union. (RT 31:20-25.) Oliver did intervene with another Post Office branch to help Bak's wife get her job back. (RT 33:5-18.)

Bak signed a sworn statement that had been prepared by an EEOC investigator who had interviewed him. (ER 26) In that statement, Bak indicated that he had changed his mind about resigning before September 1, 1989 at which time he asked her to extend the effective date to September 11, 1989. The affidavit went on to state that Bak called Oliver on

September 12, 1989 and asked to withdraw the resignation. (ER 26)

Bak denied the affidavit accurately stated his comments to the investigator. (RT 51:6-17.) The EEOC investigator did not speak Bak's native language, Korean. Bak read it very quickly several days later and signed it. (RT 62:20-63:14; 66:1-13.)

Margaret (Peggy) Oliver testified about the August 10, 1989 meeting. She could not recall the exact date of the meeting but knew it was sometime in August in the morning. She confirmed it lasted 2-3 hours. She testified that Bak told her he was leaving the Post Office and was going into some other sort of work. She acknowledged he did dispute the grounds for the removal order. (RT 89:16-91:7.) Bak expressed great unhappiness with the way he was being treated and Oliver did propose he consider another line of work. (RT 96:16-97:13.) Oliver indicated she was not aware of the proposed removal order at that time. (RT 91:8-22.) Nor did she have the notice of resignation in her possession at that time. (RT 93:6-8.) She denied that Bak told her he wanted her to cancel the resignation. She denied that he told her he had given a letter rescinding the resignation to the secretary. (RT 92:13-20.) She denied discussing Bak" age. (RT 94:8-10.)

On September 11, 1989, she learned that Bak was still working, obtained the resignation notice, and learned it was effective September 1, 1989. She called Bak to inquire why he was still working. (RT 95:8-96:3.) Bak told her he had continued working because his wife, another postal employee, had also resigned from a different Post Office branch and they had no health benefits. Bak did not tell Oliver that he had revoked his resignation on an earlier date. (RT 96:5-15.) Oliver made arrangements for Mrs. Bak to regain her job and health benefits. (RT 96:17-98:9.)

On September 12, 1989, Bak called Oliver and told her that he wanted his job back. She told him that it was too late, but she would see that he got paid up to the 11th. (RT 99:1-18.) Oliver testified that she did not know the resignation was effective on September 1, 1989 but learned of this on September 11th or 12th, at which time she altered the effective date so that Bak could get paid for the days he had worked in September. Oliver's testimony was that the change was made on the 12th but the alteration is initialed by Oliver and the initials are dated 9-11-89. (RT 98:24-99:18.)

Oliver acknowledged the Post Office policy on withdrawing resignations provided that "employees may be permitted to withdraw their resignation request provided the request to withdraw is made before the effective date of the

resignation." (RT 102:12-21.) The withdrawal can be written or oral. (RT 102:22-24.) The request can be made to a supervisor or to the personnel department. (RT 103:25-104:13.)

David Burks testified he was one of Bak's Post Office supervisors in 1989. He testified about a July 1989 incident that led to the proposed action to terminate Bak's employment (this testimony was not pertinent to the appeal). (RT 68:17-78:4.) On August 10, 1989, Burks, Butts, Terry Johnson and a union steward advised Bak of the Notice of Proposed Removal. Bak regarded the charges as "an insult" and said he was not going to fight over them, but would resign instead. Mr. Butts gave Bak a form to complete. Pending this resignation, proposed removal action would not be implemented. (RT 78:15-80:17.) Although he knew the resignation was effective September 1, 1989, and he saw Bak working after September 1st, Burks could not recall bringing that fact to anyone's attention. (RT 81:21-82:24.)

STANDARD OF REVIEW

The trial court's findings of facts are to be honored unless they wee clearly erroneous. *Anderson v. City of Bessemer City, N.C.* (1985) 470 U.S. 564, 573-574.) The trial court's conclusion whether appellant satisfied the elements of a

prima facie case are reviewed de novo. *Yee v. Department of Environmental Services* (9th Cir. 1987) 826 F.2d 877, 882.)

SUMMARY OF ARGUMENT

As Petitioner's arguments are brief and straightforward, an extended summary is unnecessary. In short, Petitioner contends he established a prima facie case of age discrimination because the trial court's finding he failed to withdraw his resignation in time was clearly erroneous. It was clearly erroneous because Oliver's testimony denial that appellant told her he wanted to keep working was not credible and Petitioner credibly testified he told Butts of this as well.

ARGUMENT

The parties agree on the applicable law on the burden of proof in an age discrimination case as set forth in the "Pretrial Memorandum of Contentions of Fact and Law." [3]When an employee is contending his termination was the product of age discrimination, he bears the initial burden of establishing a prima facie case. *Texas Department of Community Affairs v.*

Burdine (1981) 450 U.S. 248, 252-253; *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 793, 802. If he successfully establishes a prima facie case, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory explanation for the action taken. (*Id.*) If the employer does so, the burden then reverts back to the employee to establish by a preponderance of the evidence that the explanation articulated by the employer was a pretext or ruse for discrimination. (*Id.*) The burden of going forward remains with the employee. (*Id.*)

In the instant case, in order to establish a prima facie case, Petitioner was required to demonstrate the following: (1) that he belongs to a protected class; (2) that he met the criteria for having his resignation rescinded; and (3) although he met the criteria, he suffered an adverse employment decision. *Green, supra*, 411 U.S. at 792; *Palmer v. United States* (9th Cir. 1986) 794 F2d 534, 537.)

Of course, after trial, the issue is not really whether Bak established a prima facie case, but whether he proved age discrimination. "Where the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no

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[3] The transcript states that "Mr. Bak" retrieved the form and then gave the form to "Mr. Bak." (RT p. 79:14-21.) It is apparent the first reference to Mr. Bak was a typographical error.

longer relevant." *U.S. Postal Service Bd. Of Governors v. Aikens* (1983) 460 U.S. 711, 715-716.

The trial court made the factual finding that Bak did not attempt to rescind his resignation until September 12, 1989 or thereafter. Because that attempt was untimely, the fact that the Postal Service refused to honor ir did not raise a presumption that such refusal was discriminatory. Thus, the court concluded that Bak failed to establish a prima facie case of age discrimination.

Bak contends that the trial court's conclusion that he failed to establish a prima facie case was erroneous. Bak clearly was a member of the protected class. If Bak had submitted a timely request to withdraw his resignation, that request would normally have been honored for any employee according to Postal Service's policies. Under such circumstances, the failure to do so would have raised the inference that an improper desire to discriminate against Bak motivated the divergence from normal policy. This would have established a prima facie case of age discrimination.

The trial court, however, relied upon its factual finding that Bak did not submit a request to withdraw his resignation until after the effective date of that resignation. This finding, when the evidence is viewed as a whole, was clearly erroneous.

> Although the meaning of the phrase "clearly erroneous" is not immediately apparent..." A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (citation omitted) This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. (citation omitted) *Anderson v. City of Bessemer City, N.C.* (1985) 470 U.S. 564, 573-574

There was contradictory testimony concerning whether, on August 10, 1089, Bak submitted a written rescission of his resignation to the personnel department and orally told Oliver that he was withdrawing his resignation.

The trial court found that Bak had not informed Ms. Oliver of his withdrawal of resignation. The court reasoned: "Clearly, if Mr. Bak had submitted a notice of rescission of the resignation submitted on august 10, he would not have spent hours discussing his dissatisfaction and airing other career

prospects." (ER 28, p. 5) With all due respect to the trial court's reasoning, it ignores an important fact. Even though Bak had rescinded his resignation, he still faced termination pursuant to the Notice of Removal which was still pending. It made perfect sense for Bak to complain to Ms. Oliver about the unjustified Notice of Removal and to discuss other career options he might have to pursue if the matter was not resolved.

The trial court also found it significant that in "previous administrative proceedings, Mr. Bak made no reference to his withdrawal note." (ER 28, p. 5) The trial court was referring to the May 25, 1990 administrative hearing. (ER 19) Bak clearly testified at the administrative hearing that when he met with Oliver on August 10th, he told her he wanted to cancel his resignation and continue to work. She agreed to either return his resignation notice or discard it. (ER 19, pp. 19:15-20; 29:12-18) While Bak did not mention that he also submitted a written request for cancellation, he was never asked that question. Bak was not represented by an attorney of his own choosing but by a union representative. Bak repeatedly was told by the hearing officer to confine his answers to the questions asked. (ER 19, pp. 22:3-7; 23:8-10; 23:16-20; 24:4-8) Although Bak was given the opportunity by the hearing officer to "state his case," his rambling response showed he had difficulty expressing his thoughts in a coherent and complete fashion without skillful

questioning by a trained advocate. (ER 19, pp. 26:25-29:25) In short, the fact Bak failed to mention in his testimony at that hearing that he also advised Oliver in writing of the cancellation of the resignation was of no significance since he was never asked if he had advised her in some manner other than orally.[4]

Of much greater significance is that Oliver testified at that same administrative hearing that during this meeting[5] on the 10th, Bak said he wanted to "do something about the removal" notice so that the Post Office would "just let him alone until May" when he would leave for another job. Oliver told him she could not help him in contesting the removal order because she was not "in that chain of command." (ER 19, p. 34:11-16) **Why would Bak make this remark to Oliver if he had not already withdrawn his resignation? Moreover, why would Oliver tell him that she could not help him with the removal order because she was not "in that chain of command" rather than**

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[4] It does not appear that Petitioner mentioned the remark Oliver made about his being too old at the administrative hearing. (RT pp. 55:16-56:11.) However, the issue at the administrative hearing was racial not age discrimination. (RT p. 64:3-12; ER 17-19).

[5] It is clear that the meeting Oliver described lasting several hours and including a discussion of Petitioner's grievances against the Post Office is the same meeting Petitioner says occurred on August 10, 1989, hours after he resigned. Oliver even recalled stepping out to smoke a cigarette while she was talking to Petitioner, something which Bak recalled as well about this meeting on the 10th. Oliver testified at the administrative hearing that this meeting occurred

simply reminding him that he had already resigned and it was his resignation not the removal order that was the reason he could not keep working? (ER 19, p. 34:11-16) The only reasonable inference is that she was aware he wanted to withdraw his resignation. In fact, in that same testimony, Oliver did go as far as to concede that during her conversation with Bak, she understood that he was "contemplating" withdrawing his resignation. (ER 19, pp. 43:21-44:3) Thus, the trial court's finding that Oliver left that meeting with Petitioner with the idea that he was "intent on resigning" (ER 28, p. 5) was plainly mistaken.

For the aforementioned reasons, it is submitted that Oliver's denial at trial that she had been notified before September 1, 1989 of Bak's desire to keep working at the Post Office was simply not credible and does not support the trial court's factual finding of tardy notice.

However, even if this court finds that the trial court's factual finding that Bak had not notified the personnel department or Oliver on August 10th was plausible, its factual finding that Bak never told **anyone else** about withdrawing his resignation before the effective date was clearly erroneous.

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before September 1, 1989, but could not recall the exact date. (ER 18, pp. 31:25-32:13.)

There was no contradiction of Bak's testimony that he told Butts on August 10, 1989 that he was withdrawing his resignation. This testimony was corroborated by the fact Bak kept working past September 1, 1989 and no one, not even his direct supervisors questioned this at the time. According to Postal Service's policies, a rescission of resignation need not be in writing. In fact, as the trial court recognized, "there is no prescribed method by which an employee must convey his wish to rescind his resignation." (ER 28, p. 5) Thus, even if Petitioner did not submit the written letter to the Personnel Department, as he contended, he effectively withdrew his resignation when he orally told Butts and then continued to work.

Postal Service will no doubt argue that Bak's testimony, while unchallenged on this issue, was still properly disregarded. Postal Service may point to the affidavit Bak gave the EEOC as a reason to discredit his testimony. In that affidavit, Bak supposedly claimed that he met with Oliver on September 1, 1989 at which time he asked her to extend the effective date to September 11, 1989. The affidavit went on to state that Bak called Oliver on September 12, 1989 and asked to withdraw the resignation. (ER 26) Although Bak's version of events as reflected in the affidavit was not consistent with his trial testimony, it was also not consistent with Oliver's testimony.

Oliver testified that she did not know the resignation was effective on September 1, 1989 until September 11th or 12th, at which time she altered the effective date so that Bak could get paid for the days he had worked in September. Oliver's testimony was that the change was made on the 12th but the alteration is initialed by Oliver and the initials are dated 9-11-89. (RT pp. 98:24-99:18; ER 15) Therefore, both parties would have to argue the affidavit is inaccurate. This lends credence to Bak's contention that the investigator, who did not speak Bak's native language, did not accurately record his statement. Even a cursory review of the transcript of Bak's testimony at trial as well as at the administrative hearing (ER 19) manifests that Bak's grasp of English is far from complete.

The trial court, therefore, erred in finding Bak did not present a prima facie case of age discrimination. Although the court did not specifically address the overall issue of whether Bak met his burden of proof, it is clear that the same reasonsing set forth above would control in that determination. Once it is accepted that Bak did withdraw his resignation in a timely manner, it is plain that there was no legitimate, nondiscriminatory explanation for refusing to accept his withdrawal.

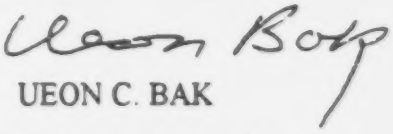
However, the trial court did not make a factual finding on whether Oliver told Bak he was "too old" to continue

working at the Post Office, presumably because it rejected Bak's claim at prima facie stage. Whether Oliver made this remark or not would obviously be significant to determining the ultimate question of whether Postal Service's motivation in refusing the withdrawal of his resignation was due to age discrimination or was based on some other factors, such as personal animosity. Therefore, if this court holds that Bak did establish a prima facie case, it would appear to be most appropriate to remand the matter to the trial court to make factual findings on the remaining subsidiary issues. (See *Aikens*, *supra*, 460 U.S. at p. 717.)

CONCLUSION

Petitioner presented sufficient evidence to establish a prima facie case of discrimination. The Petition for Writ of Certiorari should be granted to make findings on whether Postal Service met its burden to show a non-discriminatory purpose in denying rescission, notwithstanding the fact that Postal Service was notified in a timely manner of Petitioner's rescission of his resignation.

Respectfully submitted,



UEON C. BAK

Petitioner, in *Pro Se*

APPENDIX A

FILED

APR 28 1997

Cathy A. Catterson, Clerk

U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATE COURT OF APPEALS

FOR THE NINTH CIRCUIT

UEON C. BAK, Plaintiff-Appellant, vs. MARVIN T. RUNYON, Postmaster General, Defendant-Appellee.	No. 96-55658 D.C. No. CV-93-00181-AHS **MEMORANDUM***

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appeal from the United States District court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding

Submitted April 21, 1997**
Before: BROWNING, THOMPSON, and HAWKINS,
Circuit Judges.

Ueon C. Bak appeals the district court's judgment in favor of the Postmaster following a bench trial in Bak's action pursuant to the Age Discrimination in employment Act ('ADEA'), 29 U.S.C. Sec. 633(a). Bak contends that the district court clearly erred by finding that he had not timely withdrawn his resignation, thereby failing to establish a prima facie case of age discrimination. Under the ADEA. We have jurisdiction pursuant to 29 U.S.C. Sec. 1291, and we affirm.

We review a district court's findings of fact for clear error. See Heller v. Ebb Auto Corp., 8 F.3d 1433, 1438 (9th Cir. 1993).

Bak contends that the district court committed clear error when it found that he had failed to rescind his resignation before its effective date.[1/] This contention lacks merit.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R.

The district judge determined that Bak's employment was terminated due to the untimeliness of his attempted rescission on the bais of the following evidence: the credibility and testimony of Peggy Oliver, the manager of employment and development at the Post Office branch where Bak was employed; Bak's unsubstantiated testimony that he had submitted a written rescission to his resignation prior to its effective date; Bak's prior resignations from the Postal Service, all of which he had been permitted to rescind while over the age of forty; and the ages of Bak's postal supervisors.

When factual findings are based on determinations regarding the credibility of witnesses, this court gives due regard to the trial judge's findings. See Fed. R. Civ. P. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 575 (1985). Here, because the district court's credibility determinations and factual findings are adequately supported by the record, it cannot be said that the district court clearly erred. See Heller, 8 F.3d at 1438; see also Concrete Pipe & Prod. V. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993) (holding review under the clearly erroneous standard is significantly deferential, requiring

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[1/] The policy of the United States Postal Service is to allow employee to resign at their discretion. Once a resignation is submitted, it is accepted and binding unless the employee withdraws his resignation request prior to the effective date of the resignation.

reversal only if there is a "definite and firm conviction that a mistake has been committted.").

Bak, who was 46 years old when he attempted to rescind his resignation, also appears to contend that the district court erred when it held that he had not established a prima facie case of age discrimination pursuant to 29 U.S.C. Sec. 633(a). At trial, the only evidence of age discrimination was Bak's own testimony that Oliver told him that he was too old to be working at the Post Office. This testimony, however, was rejected by the district court. See Fed. R. Civ. P. 52(a); Anderson, 470 U.S. at 575. Based on our conclusion that the district court did not clearly err in finding that Bak's employment was terminated due to his untimely attempt to rescind his resignation, we agree that Bak failed to establish a prima facie case of age discrimination. See Heller, 8 F.3d at 1438 (stating that determination of whether a plaintiff has established a prima facie case is reviewed de novo); Concrete Pipe & Prod. 508 U.S. at 623.

Accordingly, the district court's judgment is hereby **AFFIRMED.**

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UEON C. BAK,	No. 96-55658
Plaintiff-Appellant,	D.C. No. CV-93-00181-AHS
v.	
MARVIN T. RUNYON, Postmaster General,	
Defendant-Appellee	

PETITION FOR REHEARING

Ueon C. Bak requests a rehearing of the ninth circuit court's affirmation of the district court's judgment in favor of the Postmaster following a bench trial in Bak's action pursuant to the Age Discrimination in employment Act ("ADEA"), 29 U.S.C. 633(A).

Bak contends that a material point of fact was overlooked in the decision. The court of Appeal's decision does not address the following argument which casts doubt on

Defendant's testimony. Note the following (contained in the appeals brief):

Of much greater significance is that Oliver testified at the same administrative hearing that during this meeting on the 10th, Bak said he wanted to "do something about the removal" notice so that the Post Office would "just let him alone until May" when he would leave for another job. Oliver told him she could not help him in contesting the removal order because she was not "in that chain of command." (ER 19, p. 34:11-16) Why would Bak make this remark to Oliver if he had not already withdrawn his resignation? Moreover, why would Oliver tell him that she could not help him with the removal order because she was not "in that chain of command" rather than simply remind him that he had already resigned and it was his resignation not the removal order that was the reason he could not keep working? (ER 19, p. 34: 11-16.) The only reasonable inference is that she was aware he wanted to withdraw his resignation. In fact, in that same testimony, oliver did go as far as to concede that during her conversation with Bak, she understood that he was "contemplating" withdrawing his resignation. (ER 19, p. 43:21-44:3.) Thus, the trial court's finding that Oliver left that meeting with appellant with the idea that he was "intent on resigning" (ER 28, p. 5.) was plainly mistaken.

Bak presents sufficient evidence for a rehearing on the material point of fact overlooked in the decision of the Ninth Circuit Court of Appeals.

DATED: May 9, 1997

APPENDIX C

Ueon Bak
9093 Blair River
F.V., CA 92708
714 968-9544

I am writing to you in hopes that you can help me in getting my job back with the Postal Service. I have been trying for the last eight years to be reinstated but the Postal service has refused to hire me.

My trouble with the post office began eight years ago on July 16, 1989 when a family emergency occurred. I had prior approval from my supervisor to leave work to take care of my 10 years old daughter. Due to the nature of the emergency, I had to have additional time off and I requested emergency leave from my post office. Rather than try to help me in my emergency, the management of the Santa Ana, California Post Office where I worked issued me a notice of proposed removal and then processed my resignation that had been canceled by me.

My career and family life now is in ruins. My marriage has been destroyed and I have lost all that I had. I was wrongfully terminated by the post office for having to take care of my daughter. The Postal service could care les bout me or my family emergency. Because of this, I have been denied due and equal process that all citizen of this country take for granted.

Many times in the past I have contacted the postmaster where I used to work hoping he would allow me to go back to work. All my attempts to meet with postal management have been useless. I have been out of work all this time. How could anyone survive in this society without having hope that things will get better?

Would you please help to save by civil rights to gain the due process the Postal service refuse to give me? I pray that you can help me return to the Postal Service and that I can put these past eight years behind me.

Thank you and God bless you.

Sincerely,
/s/ Ueon Bak
Ueon Bak

APPENDIX D

Consumer Affairs

United States Postal Service
475 L'Enant Plaza SW
Washington, DC 20260-2200

April 23, 1993

Mr. Ueon Bak
10671 Ladona Drive
Garden Grove, CA 92640

Dear Mr. Bak:

Thank you for writing to Postmaster General Marvin Runyon.

I have read your letter Mr. Bak, and asked that further review be given by the department which has functional responsibility over the issues you have raised. If appropriate, an investigation will e conducted and you will be advised of the findings.

On behalf of Mr. Runyon, please accept my personal thanks for taking the time to write to us. Comments from individuals like you help us to ensure that our commitment to provide a healthy and productive work environment for all postal employees is viable.

Sincerely,

/s/ Dan Curtis

Dan Curtis

PCES Executive

cc: Mr. Arthur T. Hambric
Area Manager
Pacific Area
850 Cherry Avenue, Room 930
San Bruno, CA 94099-0100
(information only)

Arthur O. Martinez
District Manager
Santa Ana District
3101 West Sunflower
Santa Ana, CA 92799-9993
(Action copy)

APPENDIX E

Ueon Bak
14167 Grand Meadows
Garden Grove, CA 92643
(714) 539-4863

February 21, 1995

Pacific/Western Area
USPS
ATTN-Jerome J. Brozell
appeals Review Examiner/Analyst
850 Cherry Ave.
San Bruno, CA 94099-4402

case # 4F-926-1036-95

Dear Mr. Brozell:

This is to acknowledge receipt of your letter dated February 14, 1995 accepting my complaint of discrimination. I wish to include the following issue in my complaint.

I feel I was also a victim of fraudulent management. I was coerced into resigning by management that asked me for money in order to be reinstated. When I said "No," management has found every reason possible to keep me from reinstating. No other person has had to go through this. I feel this is discrimination at its worst.

Please add this item to the specific issues of my case.

Thank You,

/s/ Ueon Bak

Ueon Bak

APPENDIX F

Legislative Affairs

UNITED STATES
POSTAL SERVICE

June 16, 1997

Mr. Ueon C. Bak
9093 Blair River
Fountain Valley, CA 92708-6436

Dear Mr. Bak:

This responds to your letter to President Clinton concerning a request for reinstatement to employment with the Postal Service.

Under Postal Service regulations, certain former career employees are eligible for reinstatement. There is no obligation, however, to reemploy an applicant. This is only one of several hiring sources local postal managers may use to fill a vacancy.

In reviewing reinstatement requests, the individual's previous Postal Service employment record is given careful consideration. Final approval or disapproval of reinstatement is within the authority of the appointing official at the postal facility where the request is made.

At the time of your removal, you should have been offered appeal options. As this late date, it is no longer applicable. Our procedures call for written requests to be submitted to the postal facility where reinstatement is desired. When hiring opportunities open, the requests are considered in order of receipt.

Thank you for writing.

Sincerely,

/s/ Faith M. Beamon

Faith M. Beamon
Senior Analyst

475 L`Enfant Plaza SW
Washington DC 20260-3500

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

F I L E D

Aug 1 1997

Cathy A. Catterson,
Clerk
U.S. Court of Appeals

UEON C. BAK,

Plaintiff-Appellant,

vs.

MARVIN T. RUNYON,
Postmaster General,

Defendant-Appellee.

No. 96-55658

D.C. No.
CV-93-00181-AHS
Central California
(Santa Ana)

ORDER

Before: BROWNING, THOMPSON, and HAWKINS,
Circuit Judges.

The motion to file a late petition for rehearing is denied as unnecessary. See Red. R. App. P. 40(a). The petition for rehearing is denied.

Supreme Court, U.S.
FILED
SEP 22 1997
CLERK

No. 97-519

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

UEON C. BAK,

Petitioner,

vs.

MARVIN T. RUNYON,
Postmaster General,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

UEON C. BAK
9093 Blair River
Fountain Valley, CA 92708

(714) 968-9544

Petitioner Pro Se

9 pp

FILED

MAR -8 1996

Clerk, U.S. District Court
Central District of
California
Southern Division at
Santa Ana

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UEON BAK,

Plaintiff,

v.

MARVIN RUNYON,
POSTMASTER GENERAL,

Defendant.

SA CV 93-181 AHS
(EEx)

JUDGMENT

This action came on for trial before the Court, the Honorable Alicemarie H. Stotler, District Judge, presiding, and the issues having been duly tried and decision having been duly rendered,

ENTERED
MAR 12 1996

It is so Ordered and Adjudged:

that plaintiff takes nothing against defendant, that judgment be entered in favor of defendant, and that defendant recover its cost of action.

Dated: March 8, 1996

/S/ Alicemarie H. Stotler

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT
COURT

FILED
MAR -8 1996

ENTERED
MAR 12 1996

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UEON BAK,

Plaintiff,

v.

MARVIN RUNYON,
POSTMASTER GENERAL,

Defendant.

SA-CV-93-181-AHS
(EEx)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AFTER COURT TRIAL

Introduction

Trial was conducted February 22, 1996, during which the Court heard testimony and received exhibits in evidence. Having duly considered the record, the Court finds that plaintiff has not proven his case and that judgment should be entered for defendant.

Pursuant to the Pretrial Conference Order, it was stipulated that plaintiff resigned on three separate occasions, each time rescinding his resignation before it was processed.

This time, plaintiff resigned shortly after the United States Postal Service (USPS or Service) presented him with a removal notice (alleging his absence without leave.)

Findings of Fact

1. This is an action under Section 15 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. Sec. 633a, in which plaintiff alleges he submitted a rescission to his earlier resignation, and his rescission was not accepted because of his age.

2. Plaintiff was employed by the Postal Service as a distribution clerk at the Santa Ana, California Post Office. Plaintiff tendered his resignation in September 1989, when he was forty-six years old.

3. On July 19, 1988, plaintiff submitted a written resignation and subsequently withdrew it. See Exhibit 101. Likewise, he resigned in writing on December 17, 1988, and orally cancelled the resignation after the Christmas holidays. See Exhibit 104. Also, on July 17, 1989, plaintiff resigned in writing citing "personal" reasons, and also subsequently orally cancelled the resignation. See Exhibit 109.

4. On August 10, 1989, plaintiff submitted a written resignation, the stated reason was "doing my own business." The resignation was to be effective on September 1, 1989. See Exhibit 111.

5. On September 19, 1989, plaintiff contacted an EEO counsellor and filed an informal complaint of discrimination alleging he was not permitted to withdraw his resignation because of discrimination. See Exhibit 113.

6. Plaintiff filed a formal administrative complaint of discrimination on September 22, 1989. See Exhibit 114. As a

result of this complaint, an investigation of plaintiff's allegations was conducted. Documents and affidavits were collected.[1]

7. At the conclusion of the investigation, on March 15, 1990, the Postal Service issued a Proposed Disposition proposing a finding of no discrimination. See Exhibit 115. Plaintiff rejected this proposal and requested a hearing.

8. On may 25, 1990, a hearing was conducted by an Equal Employment Opportunity Commission (EEOC) Administrative Judge. Plaintiff testified, as did several agency employees. See Exhibit 116.

9. After the conclusion of the hearing, on June 7, 1990, the Administrative Judge issued a recommended decision of no discrimination. See Exhibit 117. In so doing, the Administrative Judge determined that the plaintiff failed to establish a prima facie case.

10. On July 30, 1990, the Postal Service issued a Final Agency Decision, adopting the EEOC Recommended Decision. See Exhibit 118.

11. On August 13, 1990, plaintiff appealed the Final Agency Decision to the Office of Review and Appeals (ORA),[2]

---

[1] In his formal complaint, plaintiff alleged that he suffered discrimination on the bases of race, color, religion, national origin, sex, age, reprisal, and handicap. See Exhibit 114. At the hearing stage he was deemed to have dismissed all of these bases except race. See Exhibit 116. His complaint only includes the basis of age. The Ninth Circuit has ruled that one need not exhaust one's administrative remedies in age discrimination cases.

[2] Pursuant to a reorganization, this office is now called the Office of Federal Operations.

an appellate body within EEOC. See Exhibit 119. On November 14, 1990, the ORA sustained the decision of the Postal Service concluding that plaintiff had failed to establish a prima facie case of discrimination. See Exhibit 120.

12. By letter dated November 20, 1990, plaintiff petitioned the ORA to reopen his case. See Exhibit 121. On March 7, 1991, ORA declined to do so. See Exhibit 122. This suit followed.

13. The essential issue is whether the defendant refused to allow plaintiff Bak to rescind his resignation from the United States Postal Service (USPS or Service) because the Service, through its personnel, harbored an age-based bias against plaintiff who was age 46 years at the time of his resignation and alleged rescission thereof. The Court finds no such bias.

14. As noted, plaintiff resigned on prior occasions from the Service but he was allowed to withdraw the resignations. These events occurred when plaintiff was over age 40, the protected age cut-off. Two of the persons with whom plaintiff dealt, Mr. Butts and Ms. Oliver, were older than Mr. Bak. Mr. Burks is presumably younger. Each rescission was effected by Mr. Bak before the effective date. Mrs. Bak was allowed to rescind her resignation and she also is over 40 years of age.

15. The policy of the USPS is to accept resignations. Ex. 106. The "policy" of allowing employees to withdraw resignations is also acknowledged by the Service's Employees' Labor Manual, an excerpt of which constitutes Ex. 106. As plaintiff correctly points out, there is no prescribed method by which an employee must convey his wish to rescind his resignation. However, a withdrawal must occur before the "effective date" of the resignation.

16. Plaintiff was presented with a proposed Notice of Removal on August 10, 1989. He then resigned. He chose an effective date of September 1, 1989. Plaintiff asserts that he later submitted a note dated August 10, 1989, to the Personnel department's secretary, Diana Suttick; however, such note was never received by those who would act on it. In previous administrative proceedings, Mr. Bak made no reference to his withdrawal note. Plaintiff also asserts that he told his supervisors, his union steward, and Ms. Oliver herself during their 3 to 4 hour meeting on the same date – i.e., that he had revoked his resignation.

17. Ms. Oliver, on the other hand, understood Mr. Bak to be intent on resigning. He explained his unhappiness with the Service and set forth to her his numerous other career opportunities. Clearly, if Mr. Bak had submitted a notice of rescission of the resignation submitted on August 10, he would not have spent hours discussing his dissatisfaction and airing other career prospects, a discussion which both witnesses describe as taking place.

18. When September 1 came and went, Mr. Bak continued reporting to work. When inquiry was made to Ms. Oliver on September 11, 1989, why a resigned employee was still submitting time records, she learned that Mr. Bak was in fact still working. She called him at his home (his graveyard shift for the day had ended) and he explained that his need to have health insurance coverage kept him reporting to work. Ms. Oliver thereafter arranged for Mrs. Bak to regain her position at the Huntington Beach branch plus a two-week leave in order to arrange for baby-sitting.

19. After these arrangements were made, Mr. Bak agreed that Ms. Oliver could change the effective date from September 1 to September 11, 1989, in order for Mr. Bak to be paid for the last eleven days of work. Mr. Bak tried to rescind his resignation on September 12, 1989, or on a date thereafter,

date" had passed. Pursuant to Ex. 106, withdrawal of a resignation is not permitted if the effective date has passed. Such was the case for Mr. Bak, in that his resignation was already accepted by the Service.

CONCLUSIONS OF LAW

The Court finds that (1) plaintiff did not timely rescind his final resignation and (2) defendant did not fail or refuse to process a rescission of his resignation because of age-based animus. The Court concludes that plaintiff has not established a prima facie case of age discrimination. Defendant's reason for not allowing Mr. Bak to return to work is because he resigned and not because of bias against him due to his age over 40 years.

DATED; March 8, 1996.

/s/ Alicemarie H. Stotler

ALICEMARIE H. STOTLER
UNITED STATES DISTRICT
JUDGE